

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

FILED
SEP - 1 2011
Clerk, U.S. District & Bankruptcy
Courts for the District of Columbia

PUBLIC EMPLOYEES FOR ENVIRONMENTAL)
RESPONSIBILITY,)
2000 P Street NW, Suite 240)
Washington, D.C. 20036)

Plaintiff,)

v.)

OFFICE OF SCIENCE AND TECHNOLOGY)
POLICY,)
725 17th Street, NW)
Washington, DC 20502)

Defendant.)

Case: 1:11-cv-01583
Assigned To : Leon, Richard J.
Assign. Date : 9/1/2011
Description: FOIA/Privacy Act

COMPLAINT

PRELIMINARY STATEMENT

1. This action is brought under the Freedom of Information Act ("FOIA"), 5 U.S.C. § 552, *et seq.*, as amended, in order to compel the Office of Science and Technology Policy ("OSTP") to disclose records withheld wrongfully after FOIA requests and subsequent appeals from Plaintiff. FOIA requires that federal agencies respond to public requests for documents, including files maintained electronically, in order to increase public understanding of the workings of government and access to government information.
2. The records sought stem from two FOIA requests concerning agency communications regarding the cultivation of genetically engineered or genetically modified ("GE") crops on national wildlife refuges and for records reflecting information about an inter-agency working group, called the Ag. Biotech Working Group, coordinated by OSTP.

3. Specifically, in its April 18, 2011 FOIA request, Plaintiff sought: 1) all communications to and from outside (non-federal) entities, including corporations, or individuals concerning cultivation of GE crops on national wildlife refuges; and 2) all communications to and from other federal agencies, including the U.S. Fish and Wildlife Service and the Department of Interior, concerning cultivation of GE crops on national wildlife refuges.
4. Based on information it learned from documents produced in response to its April 18 FOIA request, on June 13, 2011, Plaintiff submitted another FOIA request specifically seeking: 1) all documents, including communications, which reflect the mission, nature and/or scope of activities of the Ag. Biotech Working Group or any similarly named organization in which OSTP is a member or otherwise involved; 2) all communications that OSTP has had with industry or industry representative organizations, such as the Biotechnology Industry Organization (BIO), from January 1, 2010 to the present concerning the Ag. Biotech Working Group or any similarly named organization; and 3) records reflecting any other industry-promotion or partnership arrangements in which OSTP is currently participating.
5. Plaintiff Public Employees for Environmental Responsibility ("PEER") is a non-profit organization with tax-exempt status dedicated to research and public education concerning the activities and operations of the federal government. Plaintiff requested the subject records in order to learn what communications agencies were having with other agencies and outside, nongovernmental entities, regarding government environmental policies and to learn the purpose, nature, and scope of various interagency working groups.

6. On April 18, 2011, Plaintiff submitted a FOIA request (No. 11-18) to OSTP. On May 13, 2011, OSTP both acknowledged and responded to Plaintiff's request. In its May 13, 2011 response, the agency produced eighteen documents responsive to Plaintiff's request, withholding portions of the documents under 5 U.S.C. §§ 552(b)(4), (b)(5), and (b)(6). OSTP also stated in its May 13, 2011 letter that it had located additional documents that contain "equities" of other agencies and referred these documents to those agencies for review and response. On June 10, 2011, Plaintiff appealed these withholdings and the constructive denial of its FOIA request. OSTP responded to Plaintiff's appeal on June 27, 2011 denying Plaintiff's appeal.
7. On June 13, 2011, Plaintiff submitted a FOIA request (No. 11-32) to OSTP. The agency acknowledged Plaintiff's request in a letter dated July 11, 2011. In this letter, OSTP stated that it was processing Plaintiff's request and that it would release responsive records on a rolling basis. Plaintiff has yet to receive any records pursuant to this request and the agency constructively denied the June 13 request by failing to produce records within twenty (20) working days. Plaintiff appealed the constructive denial of its FOIA request on July 18, 2011. To date, OSTP has not provided a response to the FOIA request or appeal as required by law.
8. OSTP's conduct is arbitrary and capricious and amounts to a denial of Plaintiff's FOIA requests. OSTP's conduct frustrates Plaintiff's efforts to educate the public regarding ongoing activities at OSTP and is a violation of the FOIA.

9. Plaintiff seeks a court order requiring OSTP to produce immediately the documents sought in the April 18, 2011 and June 13, 2011 FOIA requests, as well as other appropriate relief.

JURISDICTION AND VENUE

10. This Court has jurisdiction over this action pursuant to the Freedom of Information Act, 5 U.S.C. § 552(a)(4)(B). This Court also has jurisdiction over this action pursuant to 28 U.S.C. § 1331 (federal question jurisdiction).
11. This Court has the authority to grant declaratory relief pursuant to the Declaratory Judgment Act, 28 U.S.C. § 2201, *et seq.*
12. This Court has the authority to award costs and attorneys' fees under 28 U.S.C. § 2412 and 5 U.S.C. § 552(a)(4)(E).
13. Venue is properly vested in this Court pursuant to 28 U.S.C. § 1391(e), because the Defendant resides in this district and a substantial part of the events and omissions which gave rise to this action occurred in this district. Venue is also proper under 5 U.S.C. § 552(a)(4)(B).

PARTIES

14. Plaintiff PEER is a non-profit public interest organization, with its main office located in Washington, D.C., and field offices located in California, Colorado, Florida, Massachusetts, Arizona, New Jersey, and Tennessee.

15. PEER is not a commercial enterprise for purposes of the fee waiver provisions of FOIA. *See* 5 U.S.C. § 552(a)(4)(A)(iii). Among other public interest projects, PEER engages in advocacy, research, education, and litigation relating to the promotion of public understanding and debate concerning key current public policy issues, focusing on the environment, public lands and natural resource management, public funding of environmental and natural resource agencies, and ethics in government.
16. Informing the public about these important public policy issues is central to PEER's mission. PEER educates and informs the public through news releases to the media, PEER's website www.peer.org, which draws between 1,000 and 10,000 viewers per day, and PEER's newsletter which has a circulation of approximately 20,000, including 1,500 environmental journalists.
17. Defendant OSTP is an agency of the United States as defined by 5 U.S.C. § 552(f)(1), and is charged with the duty to provide public access to documents in its possession consistent with the requirements of the FOIA and is denying Plaintiff access to its records in contravention of federal law.

FACTS

April 18, 2011 FOIA Request (No. 11-18)

18. On April 18, 2011, Plaintiff filed a FOIA request with the OSTP's FOIA Officer (Request No. 11-18) seeking the agency's records regarding communications concerning cultivating GE crops on national wildlife refuges. Specifically, Plaintiff sought 1) all

communications to and from outside (non-federal) entities, including corporations, or individuals concerning cultivation of GE crops on national wildlife refuges; and 2) all communications to and from other federal agencies, including the U.S. Fish and Wildlife Service and the Department of Interior, concerning cultivation of GE crops on national wildlife refuges.

19. OSTP acknowledged and responded to Plaintiff's request in a letter dated May 13, 2011. By this letter, OSTP stated that it found eighteen records responsive to Plaintiff's request and produced these records, but withheld portions of the records under 5 U.S.C. §§ 552(b)(4), (b)(5), and (b)(6) (Exemptions 4, 5, and 6). OSTP also stated in this letter that it located additional responsive documents that contain "equities held by other federal agencies" and that it referred these documents to those agencies for release. These agencies are the Council on Environmental Quality, Department of Agriculture, Department of Health & Human Services, U.S. Fish and Wildlife Service, and the Environmental Protection Agency.
20. On June 10, 2011, Plaintiff appealed the OSTP's constructive denial of its FOIA request and the withholdings (No. 11-18(A)). Specifically, Plaintiff appealed the redactions under Exemptions 4, 5, and 6, that OSTP had made no effort to segregate exempt and non-exempt material as required by FOIA, and that the referral of documents to other agencies improperly impeded the production of records within the statutory time frame.
21. On June 27, 2011, OSTP sent Plaintiff a letter acknowledging and responding to Plaintiff's appeal. In this letter, OSTP denied every part of Plaintiff's appeal.
22. Plaintiff continues to challenge the unlawful redactions made under Exemption 4 and the referral of documents to other agencies for response. Specifically, OSTP wrongfully

withheld portions of an unsolicited email from an industry representative to an OSTP official claiming that the withheld portions contained “confidential business information.” Exemption 4 states that an agency may claim an exemption from a FOIA request for “trade secrets and commercial or financial information obtained from a person and privileged and confidential.” 5 U.S.C. § 552(b)(4). OSTP has not articulated any valid reason why this information is properly exempt, but merely asserts in its June 27, 2011 response to Plaintiff’s appeal that the information is commercial and that the industry trade group’s status as a nonprofit does not affect the application of Exemption 4. Plaintiff cannot fathom what proprietary information an industry lobbyist would have sent over unsolicited to an agency with no regulatory role and without a request or promise of confidentiality.

23. OSTP’s referral of documents for response to other agencies wrongfully impeded the production of records within the statutory timeframe. To date, Plaintiff has received communications from three of the five agencies OSTP referred Plaintiff’s request to. U.S. Department of Agriculture (“USDA”) responded and produced documents on May 27, 2011. USDA withheld portions of responsive records under Exemptions 5 and 6. The U.S. Environmental Protection Agency responded and produced documents on June 9, 2011, and also withheld portions of the records under Exemptions 5 and 6. The Department of Health & Human Services acknowledged the referral by two letters dated August 22, 2011 and August 24, 2011, and produced responsive records in a letter dated August 29, 2011, but withheld portions under Exemptions 5 and 6. Plaintiff has not received documents or communication from the Council on Environmental Quality or U.S. Fish and Wildlife Service regarding the referral.

24. Plaintiff has fully exhausted its administrative remedies under 5 U.S.C. § 552(a)(6)(C) for its FOIA request, and now turns to this Court to enforce the remedies and public access to agency records guaranteed by FOIA.

June 13, 2011 FOIA Request (11-32)

25. Based on information it learned from documents produced in its April 18 FOIA request, on June 13, 2011, Plaintiff submitted another FOIA request seeking information regarding the Ag. Biotech Working Group's function, purpose, and communications, as well as documents relating to similar working groups and projects. Specifically PEER sought 1) all documents, including communications, which reflect the mission, nature and/or scope of activities of the Ag. Biotech Working Group or any similarly named organization in which OSTP is a member or otherwise involved; 2) all communications that OSTP has had with industry or industry representative organizations, such as the Biotechnology Industry Organization (BIO), from January 1, 2010 to present concerning the Ag. Biotech Working Group or any similarly named organization; and 3) records reflecting any other industry- promotion or partnership arrangements in which OSTP is currently participating.
26. OSTP acknowledged receipt of Plaintiff's request in a letter dated July 11, 2011. By this letter, OSTP informed Plaintiff that it located documents responsive to Plaintiff's request and that some of the records contained "equities from other federal agencies." OSTP stated that it was consulting with these other agencies and would release records on a "rolling basis."
27. Plaintiff did not receive any documents within the statutory timeframe (20 work days) for responding to a request.

28. On July 18, 2011, Plaintiff appealed the OSTP's constructive denial of its FOIA request. *See* 5 U.S.C. § 552(a)(6)(A)(ii).
29. To date, Plaintiff has yet to receive an acknowledgment of its appeal and Plaintiff has not been provided with any of the requested information.
30. Plaintiff has fully exhausted its administrative remedies under 5 U.S.C. § 552(a)(6)(C) for its FOIA request, and now turns to this Court to enforce the remedies and public access to agency records guaranteed by FOIA.
31. On January 21, 2009 President Barack Obama issued an Executive Memo declaring the following policy: "The Freedom of Information Act should be administered with a clear presumption: In the face of doubt, openness prevails. The Government should not keep information confidential merely because public officials might be embarrassed by disclosure, because errors and failures might be revealed, or because of speculative or abstract fears. . . . All agencies should adopt a presumption in favor of disclosure, in order to renew their commitment to the principles embodied in FOIA, and to usher in a new era of open Government. The presumption of disclosure should be applied to all decisions involving FOIA."

CAUSE OF ACTION

Count I: Violation of the Freedom of Information Act

32. Plaintiff repeats the allegations in paragraphs 1 through 31.

33. OSTP's failure to disclose the requested documents and its withholding of portions of disclosed documents is a violation of FOIA, 5 U.S.C. § 552, and the agency's own policies thereunder.

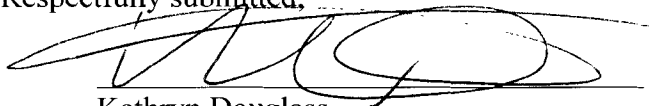
RELIEF REQUESTED

WHEREFORE, Plaintiff respectfully requests and prays that this Court:

- i. Enter an Order declaring that OSTP has wrongfully withheld the requested agency records;
- ii. Issue a permanent injunction directing OSTP to disclose to Plaintiff all wrongfully withheld documents and parts of documents;
- iii. Maintain jurisdiction over this action until OSTP is in compliance with FOIA, APA and every order of this Court;
- iv. Award Plaintiff its attorney fees and costs pursuant to 5 U.S.C. § 552(a)(4)(E); and
- v. Grant such additional and further relief to which Plaintiff may be entitled.

Dated: September 1, 2011

Respectfully submitted,



Kathryn Douglass
DC Bar No. 995841
Staff Counsel
Public Employees for Environmental Responsibility
2000 P Street, NW Suite 240
Washington, D.C. 20036
(202) 265-7337